1999

State of Utah v. Shannon Jess Ashcraft : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellees,	:	Case No. 990678-CA
v.	:	Priority No. 2 Appellant in Custody
SHANNON JESS ASHCRAFT,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM A JUDGEMENT AND COMMITMENT FOR POSSESSION OF A FIREARM AND POSSESSION OF A DANGEROUS WEAPON, IN VIOLATION OF UTAH CODE ANN. § 76-10-503(2), A SECOND AND THIRD DEGREE FELONY RESPECTIVELY, SUCH JUDGEMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT, TOOELE COUNTY, STATE OF UTAH, THE HONORABLE JUDGE LEE DEVER PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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Pursuant to Rule 24(a)(11)of the Utah Rules of Appellate Procedure, no addenda is necessary.

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IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff/Appellees, : Case No. 990678-CA

v.

Priority 2-Appellant in Custody

SHANNON JESS ASHCRAFT, :

Defendant/Appellant. :

BRIEF OF APPELLANT

JURISDICTION

This is an appeal on behalf of Shannon Jess Ashcraft from a jury trial conviction of one count of a violation of Utah Code Annotated §76-10-503(2), Possession of a Firearm by a Restricted Person and one count of a violation of Utah Code Annotated §76-10-503(2), Possession of a Dangerous Weapon by a Restricted Person in the Third Judicial District Court, in and for Tooele County, the Honorable Lee Dever presiding.

This Court obtains jurisdiction to review the appeal pursuant to Utah Code Annotated §78-2a-3(2)(e) and Rule 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

Did the prosecutor's argument during closing-- instructing the jury to consider as credible evidence an anonymous phone call alleging Mr. Ashcraft was driving around Tooele in a white van, brandishing a gun-- so prejudice the jury that despite the lack of sufficient evidence to sustain a conviction, the jury round Mr. Ashcraft guilty?

A claim of prosecutorial misconduct grounded in improper argument by the prosecution during trial is plain error when the trial judge fails to provide a curative instruction after proper

objection by defense counsel. Plain error in this case is the proper standard of review. State v. Emmett, 839 P.2d 781, 785-86 (Utah 1992).

Was there sufficient evidence to convict Mr. Ashcraft of possession of a firearm when he did not have constructive or actual possession of the firearm? Was there sufficient evidence to convict Mr. Ashcraft of possession of a dangerous weapon when he owner of the knife claimed ownership of the weapon and testified that as a passenger in Mr. Ashcraft's vehicle he had possession of the knife and Mr. Ashcraft did not?

Sufficiency of the evidence is a question of fact and this Court reviews the facts and evidence in a light most favorable to the jury's verdict and will reverse such a verdict only if that evidence is so"inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Souza, 846 P.2d 1313, 1322 (Utah Ct. App. 1993).

STATEMENT OF THE CASE

Defendant/Appellant Shannon Jess Ashcraft was charged by way of Amended Information on August 31, 1998 with Count I Possession of a Firearm by a Restricted Person, a second degree felony in violation of U.C.A. 76-10-503(2) alleging Mr. Ashcraft possessed a Ruger Red Hawk 44 magnum revolver, and Count II Possession of a Dangerous Weapon by a restricted Person, a third degree felony in violation of U.C.A. 76-10-503(2) alleging Mr. Ashcraft possessed a knife (R. 1 &2).

A jury trial was held on September 22, 1998 in which jury instructions given to the jury provided: .....that on or about June 10, 1998, in Tooele County, State of Utah, the defendant, Shannon Jess Ashcraft, while on probation for a felony, did have in his possession or under his

custody or control a firearm..[and] a knife....(R.35 & 36).

The jury found Mr. Ashcraft guilty of both counts (R. 3 & 39) and on November 23, 1998 the Honorable Judge Lee Dever sentenced Mr. Ashcraft to a sentence of one to fifteen years in prison for Count I and a sentence of zero to five years in prison for Count II with the sentences to run consecutive to each other and to the one Mr. Ashcraft was currently serving (R. 44 & 45).

On December 3, 1998 defense counsel (trial counsel) filed a Motion for New Trial based on the prosecutor's comments during closing arguments (R. 47). A transcript of the trial was prepared and on June 28, 1999 both sides presented argument before the trial court on the Motion for New Trial (R. 58 & 65 & 89).

On July 26, 1999 Judge Dever denied the Motion for New Trial (R. 96) and on August 4, 1999 the Notice of Appeal was filed by newly appointed appellate counsel at the direction of the defendant (R. 97).

RELEVANT STATUTES AND REGULATIONS

There are no relevant statutes or regulations relevant to the issues raised on appeal other than those jurisdictional provisions already cited in the brief.

STATEMENT OF FACTS

On June 9, 1998 Officer Robert Eckman, a Utah Adult Probation and Parole Officer assigned to Tooele received a telephone call in which an unidentified person claimed that Mr. Ashcraft was driving in town brandishing a weapon (R.99, P. 50-52). Eckman and another agent, Lonnie Walters, drove around Tooele that day looking for Mr. Ashcraft but did not locate him (R.99, P. 54). After Eckman was off duty he went to Wal-Mart and saw Mr. Ashcraft pull into a parking stall close to him. Eckman went home, got his gun and state car and called for a back-up

officer to assist him in stopping Mr. Ashcraft (R.99, P.55-56). Eckman approached the vehicle, a white van, and told Mr. Ashcraft to exit the van (R.99, P.57). As a condition of parole Mr. Ashcraft could not refuse a search of his vehicle (R.99, P. 58). Mr. Ashcraft was in the driver's seat of the van and Heather Johansen was in the front passenger seat (R.99, P. 57,59). During the search of the van a knife was found between the seat belt and the drivers seat on the floor–it was tucked between the seat belt bracket and the seat (R.99, P. 62).

In the glove box under the passenger's seat of the van a box containing 44 and 38 caliber ammunition was found (R.99, P. 65). Mr. Ashcraft was arrested and taken to the Tooele County Jail (R.99, P 65). After the arrest, Heather Johansen brought a bill of sale to the Adult Probation and Parole office which states, "To Whom It May Concern, I Leo Andrews sold Bill Besmehn, Ruger, Red hawk, serial number 500-00864, for the sum of $250, paid in full. Seller: Leo Andrews. Buyer: Bill Besmehn." (R. 99, P. 69).

The second paragraph of the document states, "I Bill Besmehn, sold to Shannon Ashcraft, Ruger Red Hawk, serial number 500-00864, for the sum of $300, paid in full. Seller: Billy, Buyer: Shan Ashcraft, Date: 6-3-98." (R. 99, P. 69).

A gun was then introduced into evidence with the same serial number as the bill of sale. Eckman obtained the gun and a hand written statement from Heather Johansen after Mr. Ashcraft was arrested (R. 99, P. 70-72).

The handwritten statement is as follows, " To Whom It May Concern: I, Heather Johansen, was with Shannon Ashcraft of the 3rd day of June 1998, when he purchased the Ruger Red Hawk, serial number 500-00864, and a box of bullets from Bill Besmehn. Shannon's friend, Bill Besmehn, had told Shannon that he needed money to pay his rent for the month and asked if

Shannon would purchase the Ruger Red Hawk. Shannon and I both knew he was on parole and could not have the gun in his possession. That is why the gun was taken straight to a residence where we both felt comfortable leaving it. The gun was in neither of our possession until June 10, 1998, when I went and picked it up and handed it over to Officer Stidham. [signed] Heather Johansen. June 10, 1998 (R.99, P. 72).

Another statement of Ms. Johansen reads: "To Whom It May Concern: I, Heather Johansen, am writing this to let you know that Shan Ashcraft left his gun in my possession and he never had access or never intended to have access to his weapon. (R. 99, P. 74).

At the time of the arrest, a passenger, Victor Lopez was seated directly behind Mr. Ashcraft (R.99, P. 79). Victor Lopez told Eckman that the knife was not Mr. Ashcraft's knife but belonged to Lopez (R.99, P.80). From where Mr. Lopez was seated, he could have placed easily placed the knife or removed the knife from its location (R.99, P.80).

The ammunition was found under the passenger seat, under Heather Johansen, in a glove box that slides out from under the seat (R.99, P.81). Eckman did not find a firearm on Mr. Ashcraft or in the vehicle (R.99, P. 81).

Mr. Ashcraft did not own the vehicle–however he was sitting in the driver's seat when he was stopped (R.99, P. 82).

Officer Mike Stidham of the Tooele County Sheriff's Department interrogated Shannon Ashcraft at the Tooele County Jail after Mr. Ashcraft was arrested and placed on a 72 hold for alleged violation of his parole agreement (R.99 P. 40-42). Officer Stidham testified that Mr. Ashcraft told Stidham that he purchased the gun from a friend and Heather Johansen had it (R.99, P. 42).

Stidham called Heather, who then went to her mother's boyfriend's home where Heather retrieved the gun. The gun was in a storage room, in the basement (R.99, P. 44, 109).

Bill Besmehn testified that he was longtime friend of Mr. Ashcraft and when Besmehn needed money he sold his gun to Mr. Ashcraft. It was to be temporary, when Besmehn repaid the $300.00 loan he would get the gun back (R.99, P.93-95). Bushmen wrote the bill of sale to Mr. Ashcraft and received the $300 a day later. Bushmen paid his rent with the money and the next day, the 4th, Heather Johansen picked up the gun from Besmehn (R.99, P. 95-99).

Heather Johansen testified that she picked the gun up from Bill Besmehn on June 4th, 1998 (R.99, P. 108-109). She testified that Mr. Ashcraft did purchase the gun in a sense in as much as he gave Besmehn $300 and the gun and bill of sale were collateral until the loan was paid off (R. 99, P. 108-110). Heather picked the gun up from Besmehn and took it to her mother's boyfriend's house where it would be kept (R.99, P. 110). Heather did not see the gun until Mr. Ashcraft called her from the jail and told her to give it to Stidham (R.99, P. 111).

Heather got the gun from her mother's boyfriend's house and took it to her house where she hid it in the basement to keep it out of the reach of the children-- until the police arrived (R. 99, P. 111). In fact the police had searched Heather's house prior to that and did not find the gun (R.99, P. 112).

The night of the arrest, Heather saw Victor get into the van and he was holding the knife (R.99, P. 113). Victor testified that he bought the knife at a swap meet and had taken it to a friends house to show it to him. Victor needed a ride home and Mr. Ashcraft offered to take him home the night of the arrest (R.99, P. 122-124).

SUMMARY OF THE ARGUMENT

Mr. Ashcraft asserts that the trial court erred in denying his motion for new trial. The motion was based on two main points of contention; first, that the prosecutor made improper statements and arguments to the jury during the closing. Second, that without the improper statements there would have been no conviction for possession of the gun as there was insufficient evidence to sustain such a conviction.

Finally, Mr. Ashcraft alleges that there is insufficient evidence to support the conviction for possession of a dangerous weapon (knife).

The standards of review for the prosecutorial misconduct and insufficient evidence are set forth above.

ARGUMENT

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT WERE SO PREJUDICIAL THAT NO CURATIVE STATEMENT BY THE TRIAL JUDGE COULD CORRECT THE ERROR HAD IT BEEN GIVEN; AND WITHOUT THE STATEMENT TO INFLUENCE THE JURY THERE INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT.

Trial counsel brought a Motion in Liminie the morning of trial seeking to limit the testimony of Officer Eckman and the contents of Eckman's report (R.99, P. 1,2,3,4). The information counsel sought to keep out of trial was the information of the anonymous phone call that Eckman received which implicated Mr. Ashcraft was violating his parole agreement (R.99, P. 2,3). Trial counsel argued that as the caller would not provide her identity, the statements were hearsay, could not be verified nor corroborated and the information was highly prejudicial and that Eckman should not be allowed to divulge the contents of the phone call (R.99, P. 1-4). The

trial judge ruled that without knowing about the call and its contents that the jury would be confused as to the motivation of Eckman to look for Mr.. Ashcraft. On that basis the judge denied defense counsel's motion in allowing the statement in for foundational purposes only (R.99, P. 4-5).

Although the phone call is mentioned several times in Eckman's testimony, in closing the prosecutor used the testimony and expanded it into a highly prejudicial statement:

"Now the defendant makes a point on cross-examination that the person who called in the tip that Shannon was brandishing a firearm, or threatening people with it when he was in the white van, didn't leave a name. And of course if a person leaves their name we're going to give them a little more credibility than someone who doesn't. But put yourself...

{Mr. Freestone begins speaking} Your honor, I'm going to object to this-to this closing statement regarding the statement of the unidentified person. The reason that was admitted, if you recall, was for foundation, not for truth of the matter asserted. At this point, he's arguing that truthful matter asserted.

{Judge Dever begins speaking} Well, ladies and gentlemen....

{The prosecutor interrupts the court} I don't think I'm doing that your honor, that's not my intent.

{The trial Judge} This statement that was admitted was not admitted for the truth or falsity of the statement, but simply as a basis for the position that Mr. Eckman took, and the actions he took. And that [is] all it is to be considered for, and for no other reason.

{The prosecutor finishes} In other words, we're not alleging that Shannon was actually brandishing the firearm, because we didn't have anybody who saw him do that. We don't have

that person's name. But, because of that tip, we wanted to find Shannon Ashcraft, and find out what he was doing and why he–whether, in fact–he had a gun. And that all thats information was being admitted for. Its to lay a foundation as to why Officer Eckman went out looking for him. However, that tipster's information was verified in two regards. First, Shannon was in fact driving a white van. And second of all, Heather gives the officer a bill of sale which she got out of the glove box apparently, showing that Shannon in fact did have a gun. So we submit that the tipster's information was verified after the fact (R.99, P.156).

The trial judge never made any curative comment, instruction or remark after this damaging and improper statement of the prosecutor.

Mr. Ashcraft contends that the prosecutor's remarks regarding the tipster's call and his opinion about aspects of the call being bolstered or corroborated makes the testimony regarding the call–testimony that was introduced for the truth of the matter asserted. Such commentary on the tip during closing argument brought evidence and information to the jury that would have been inadmissible at the evidentiary stages of the trial.

The prosecutor acknowledged to the jury that the information should not be looked at for its truthfulness–only why Eckman was looking for Mr. Ashcraft–then the prosecutor goes ahead and does exactly what he was not supposed to do–use the information for the truth of the matter asserted (that Mr. Ashcraft was driving around town brandishing a gun).

On page155, lines 20-25 and page 156 line 1 the prosecutor tells the jury that the call was corroborated and verified after the fact. This statement to the jury tells the jury that Mr. Ashcraft was indeed brandishing (possessing) a gun. Without that statement there is no witness testimony or evidence that Mr. Ashcraft ever had actual possession of a gun.

The evidence of constructive possession of the gun was insufficient to support a guilty verdict in that Heather testified that she picked up the gun from Bill Besmehn and she took it to her mother's boyfriend's home for safekeeping. Heather testified she retrieved the gun and took it to her house to give to the police only after Mr. Ashcraft was in custody. Bill Besmehn testified he gave the gun to Heather, he never gave the gun to Mr. Ashcraft. Officer Eckman testified that he never saw Mr. Ashcraft with the gun or any gun.

The only way a verdict of guilty for constructive possession can be legitimately found (without the prosecutor's remarks) is to find that Mr. Ashcraft's purchase of the gun was constructive possession. However, Utah law has a statute specifically in place for such an act and Mr. Ashcraft was not charged with that statute. (76-10-503(3)).

The only evidence of constructive possession produced at trial was the sale/purchase of the gun from Besmehn to Ashcraft. There was no testimony that Ashcraft held the gun, possessed the gun or ever intended to do so. No fingerprint evidence was introduced at trial to show Mr. Ashcraft held the gun.

Indeed, Heather and Bill Besmehn testified Mr. Ashcraft never held the gun–he bought it as a favor to Besmehn so he could use the $300 to pay rent.

In order to show constructive intent the prosecution had to show that the defendant had both the power or the authority AND the intent to exercise domain over the gun (R. 28).

Although by buying the gun Mr. Ashcraft may have had the ability to have the power to possess the gun–he never was able to because either Besmehn or Heather had the gun out of the control of Mr. Ashcraft. Heather and Besmehn never let Mr. Ashcraft have the gun. Finally, the prosecution had to show that Mr. Ashcraft also had the intent to possess the gun.

To show the intent to possess the prosecution must show intent by direct, positive evidence (R.28). No direct, positive evidence other than the bill of sale was introduced at trial. The bill of sale is only evidence of a purchase (covered elsewhere by Utah law) it is not evidence of possession. Indeed all witness testimony was that Mr. Ashcraft knew he could not possess a gun and was helping Besmehn out financially and therefore Heather is the only person who held the gun.

Mr. Ashcraft contends that as there was no actual possession and insufficient evidence to support a finding of constructive possession of the gun, the only way a jury could have found guilt was based on the prosecutor's improper statements about the tipster's call being verified and true.

When a prosecutor makes a clearly improper remark at trial and there is no curative instruction or an insufficient curative admonition this Court must decide if absent the improper statements if the jury verdict would be different.

In State v. Saunders, 371 Utah Adv. Rep. 6,7-8 (Utah 1999), the Utah Supreme Court held that whether or not the evidence is properly admitted or not (in this case the statement admitted to prove the truth of the matter asserted rather than as foundation) a new trial may be warranted.

" This is true regardless of whether that evidence was properly or erroneously admitted. A prosecutor who intentionally calls to jurors' attention matters that they should not consider in reaching a verdict is clearly guilty of misconduct, particularly when a prosecutor argues prior bad acts or prior criminal conduct as a basis for convicting. See State v. Emmett, 839 P.2d 781, 785-86 (Utah 1992); State v. Tarafa, 720 P.2d 1368, 1372-73 (Utah 1986)."

In this case the prosecutor called the jury's attention to the citizen caller's statements that

Mr. Ashcraft had a gun, was brandishing the gun and driving around town in a white van. He went on to assert that as Mr. Ashcraft was driving around in a white van and there was a bill of sale for a gun and therefore, Mr. Ashcraft must have had possession of a gun.

"The test for determining whether a prosecutor's statements in closing argument are improper and constitute error is whether his remarks "call [ ] to the jurors' attention matters which they would not be justified in considering in reaching a verdict." State v. Creviston, 646 P.2d 750, 754 (Utah 1982).

"[A prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Emmett, 839 P.2d 781, 785-86 (Utah 1992) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

Considerable latitude is allowable in closing argument. Counsel may discuss fully both the evidence and all legitimate inferences arising from the evidence. Such argument may merit reversal if (1) the remarks called to the jurors' attention matters which they would not be justified in considering in reaching a verdict, and (2) under the circumstances, the jurors were probably influenced by the remarks *Id.* (quoting State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426

(1973).

"This Court has established a test to determine whether a prosecutor engaged in misconduct and whether that misconduct constitutes reversible error. A prosecutor's actions and remarks constitute misconduct that merits reversal if the actions or remarks call to the attention of the jurors matters they would not be justified in considering in determining their verdict and, under the circumstances of the particular case, the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant." State v. Tillman, 750 P.2d 546 (Utah 1987), (rehrg. denied 1988).

Once this Court determines that a prejudicial and improper argument was made, this Court must look at whether a sufficient curative instruction was given (here none was given after the second and most damaging statement). The Court then determines if the jury most likely was impacted by the improper statements and then the Court must decide if based on all the other evidence presented at trial if the result would have still been a conviction.

Here the statement is clearly prejudicial and no curative instruction was given to the jury despite the objection by trial counsel to the statements. At issue now is wether there was sufficient evidence to sustain a conviction 1) for the gun charge; absent the prejudicial statements and 2) for the knife charge based on the testimony and evidence presented.

In State v. Longshaw,961 P.2d 925 (Utah App. 1998), this Court found that the prosecutor misstated the law therefore making improper remarks in closing arguments. However, once that finding has been made the issue becomes whether absent the remarks a different result would have occurred.

"Finally, step two of the prosecutorial misconduct test requires "consideration of the

circumstances of the case as a whole. In making such a consideration, it is appropriate to look at the evidence of defendant's guilt." {citations omitted} Thus, "'[i]f proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial.'Likewise, in a case with less compelling proof, [an appellate court] will more closely scrutinize the conduct." Id.. at 931.

In Mr. Ashcraft's case there was insufficient evidence to support his conviction and absent the statements of the prosecutor-- that a citizen had seen Mr. Ashcraft not only in possession of a gun but brandishing it while driving around town–there is no other evidence or testimony to show Mr. Ashcraft possessed a gun.

The testimony presented was that Mr. Ashcraft never had the gun, nor did he intend to have the gun. He paid money for it to help out his friend but never intended to touch the weapon. Only Heather had constructive or real possession of the gun.

Stemming from the issue of prosecutorial misconduct is the argument that absent the remark there is insufficient evidence to sustain a conviction.

In Longshaw this Court held:

"Because we owe "broad deference to the fact finder, [our] power to review a jury verdict challenged on grounds of insufficient evidence is limited." State v. Souza, 846 P.2d 1313, 1322 (Utah Ct.App.1993). Accord State v. Scheel, 823 P.2d 470, 472 (Utah Ct.App.1991). We review the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the jury's verdict and reverse[ ] only if that evidence is so " 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which [she] was convicted.' "

(citation omitted).

In this case Mr. Ashcraft asserts that more than mere contradictory evidence was presented to the jury. He claims that NO evidence of actual possession of the gun was provided. He contends that any evidence of constructive possession of the gun (the bill of sale) was squarely negated by Heather Johansen and Bill Besmehn's testimony that he never intended to have the gun.

Lastly, Mr. Ashcraft asserts that he never had actual or constructive possession of the knife. The knife was placed in a spot in the van where Victor put it. Heather saw Victor take the knife into the van. Victor testified it was his knife, he bought it at the swap meet and that in no way did Mr. Ashcraft ever have it or intend to have it.

Even officer Eckman testified that the knife was located where Victor could easily reach it and have access to it. There is no evidence that Mr. Ashcraft took the knife into the van or ever held the knife. No fingerprints of Mr. Ashcraft on the knife were presented at trial. The only connection between Mr. Ashcraft and the knife is that both were in the van at the same time.

Such testimony is not mere contradictory evidence with conflicting inferences, it shows that without the misconduct of the prosecutor–no conviction would be warranted.

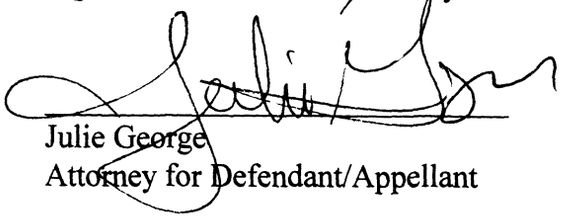
PRECISE RELIEF SOUGHT

Counsel does not request oral argument or a published opinion in this case.

CONCLUSION

Mr. Ashcraft respectfully asks this Court to reverse his conviction and remand the case back to the trial court where he can be given a new trial without the prosecutor's harmful and prejudicial remarks swaying the jury into an unwarranted conviction.

Signed and Dated this 18th Day of November, 1999.



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CERTIFICATE OF MAILING

I hereby certify that on this 18 day of November, 1999, I mailed, first class postage pre-paid, true and correct copies of the foregoing Appellant's Brief to:

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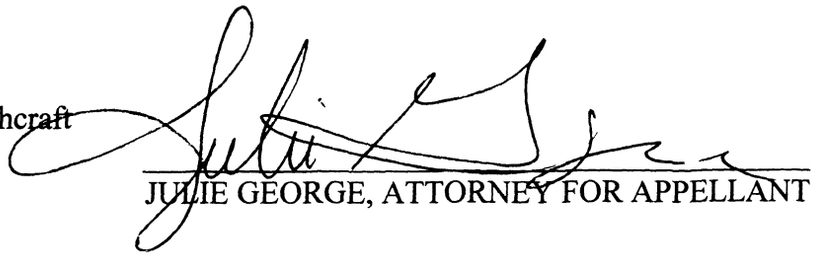
Defendant/Appellant Shannon Ashcraft



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